

STATE OF MICHIGAN
COURT OF APPEALS

SAMUEL F. NASTASE,

Plaintiff-Appellant,

V

LOUIS D. GUIDO and JEREMY HUGHES,

Defendants-Appellees.

UNPUBLISHED

May 31, 2005

No. 254245

Wayne Circuit Court

LC No. 02-213476-CZ

Before: Neff, P.J., and Owens and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendants. On appeal, plaintiff argues that the trial court erred in granting defendants' motion for summary disposition and dismissing his defamation, false light invasion of privacy, malicious prosecution and abuse of process claims. We affirm.

I

At the times relevant to this case, plaintiff was a teacher at Dearborn High School (DHS) where defendant Guido was principal. Defendant Hughes was the Superintendent of Dearborn Schools. Over a course of time, tensions developed between plaintiff and defendant Guido leading Guido to file a formal administrative complaint with Hughes about plaintiff who was then suspended from his teaching position with pay. At that point, Guido circulated a memo to high school staff reporting the fact of plaintiff's suspension and that plaintiff was not to be on school property. Guido also filed a police report with regard to plaintiff's suspension, the fact that he was barred from school premises and that he (Guido) felt threatened by plaintiff.

The administrative process found plaintiff guilty of no offense and no criminal charge was ever filed against him. Plaintiff was reinstated to his teaching position. Plaintiff then filed this case against defendants.

II

Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10).¹ This Court reviews a trial court's determination regarding a motion for summary disposition de novo. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). Where, as here, it is unclear under which court rule the trial court granted a motion for summary disposition, but it is clear that the court looked beyond the pleadings, we will treat the motions as having been granted pursuant to MCR 2.116(C)(10). *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim and we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in the light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists. *Id.* Summary disposition is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

III

Plaintiff first argues that the trial court erred in dismissing his defamation claims against defendants, Louis D. Guido and Jeremy Hughes, because there exist genuine issues of material fact underlying the elements of his claims. "A defamatory communication is one that tends to harm the reputation of a person so as to lower him in the estimation of the community or deter others from associating or dealing with him." *American Transmission, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695, 702; 609 NW2d 607 (2000).

The elements of a cause of action for defamation are (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by the publication (defamation per quod). [*Id.*]

A

Turning to the first element, the plaintiff must present evidence to show that the defendant made a false and defamatory statement concerning the plaintiff. *Ireland v Edwards*, 230 Mich App 607, 614; 584 NW2d 632 (1998). The "court may decide as a matter of law whether a statement is actually capable of defamatory meaning." *Id.* at 619. Words charging the commission of a crime are defamatory per se, and hence, injury to the reputation of the person

¹ Although defendants did not cite these court rules specifically, they sought dismissal "for failure to state a claim upon which relief can be granted and there remains no genuine issue of material fact," which parrots the language MCR 2.116(C)(8) and (C)(10), respectively.

defamed is presumed to the extent that the failure to prove damages is not a ground for dismissal. *Burden v Elias Bros Big Boy Restaurants*, 240 Mich App 723, 727-728; 613 NW2d 378 (2000).

However, "truth is an absolute defense to a defamation claim." *Porter v City of Royal Oak*, 214 Mich App 478, 486; 542 NW2d 905 (1995). Further, "the common law has never required defendants to prove that a publication is literally and absolutely accurate in every minute detail . . . [and] Michigan courts have traditionally followed this approach." *Rouch v Enquirer & News of Battle Creek Michigan (After Remand)*, 440 Mich 238, 258-259; 487 NW2d 205 (1992). That a statement is "substantially true" is a defense to a charge of defamation by implication. *Hawkins v Mercy Health Services*, 230 Mich App 315, 329-333; 583 NW2d 725 (1998). The test for substantial truth involves looking "to the sting of the article to determine its effect on the reader; if the literal truth produced the same effect, minor differences were deemed immaterial." *Rouch, supra* at 259. In the context of the substantial truth defense, a defamation defendant "is not responsible for every defamatory implication a reader might draw from his report of true facts, absent evidence that he intended the defamatory implication." *Royal Palace Homes, Inc v Channel 7 of Detroit, Inc*, 197 Mich App 48, 56; 495 NW2d 392 (1992) (citation omitted).

B

Here, plaintiff identifies three publications made by defendants which serve as the basis for his claims: (1) Guido's May 7, 2001, administrative formal complaint; (2) Guido's report to the Dearborn Police Department; and, (3) the May 7, 2001, memorandum and affixed "mug shot" sent to the Dearborn High School ("DHS") staff stating that plaintiff was relieved of his teaching duties and was not permitted on school grounds.

The majority of the information in these three documents is true. Although Guido's formal complaint enumerates the reasons that caused Guido to "feel personally and physically threatened" by the actions taken by plaintiff, plaintiff fails to show that any of the actions cited by Guido were false. The police report contains the true statements that plaintiff was suspended and the police advised defendants to circulate a memorandum informing the staff that plaintiff was not permitted on school property. With respect to the memorandum sent to the DHS staff, plaintiff admitted at his deposition that this memorandum does not indicate that he was suspended because he threatened the personal safety of Guido. Otherwise, the staff memorandum provides that plaintiff was suspended, the Superintendent's Office would be conducting an investigation, the Superintendent directed plaintiff not to be on the DHS premises, and the memo instructed the staff to notify the administration if they saw plaintiff at DHS, all of which is true.

C

Plaintiff has nevertheless categorized his claim as one of defamation by implication; the implication being that plaintiff was a criminal. Therefore, the issue is whether the remaining portions of the three documents which state Guido's belief that plaintiff threatened him and his statement that he felt threatened, are objectively verifiable as false in order to support a claim for defamation.

In this respect, following the guidance of the United States Supreme Court, this Court has rejected the idea that all statements of opinion are protected speech. A statement must be provably false to constitute defamation, but a subjective assertion, on the other hand, is not actionable. *Ireland, supra* at 616. The disputed words in this case fit the description of subjective assertion, as evidenced by plaintiff's admission at his deposition that Guido's complaint that plaintiff was threatening him was indeed Guido's "opinion." Whether it is reasonable for a person to feel threatened by any given circumstance differs from person to person. Guido's assertion that he felt threatened by plaintiff has not been proven false.

To the contrary, the record shows that members of plaintiff's own union shared Guido's belief that plaintiff was, in general, a threatening individual. We can discern no objective events that could verify that either plaintiff's threats or Guido's opinion that he felt threatened was false. Because whether plaintiff made comments or performed actions that made Guido feel threatened is not objectively verifiable as false, the statement cannot support a claim of defamation. See *Ireland, supra*.

Therefore, we conclude that any statements regarding Guido's sense that he was threatened by plaintiff cannot amount to defamation. *Id.* The trial court properly found that the complained-of statements attributed to Guido are plainly his personal impression of plaintiff and the circumstances. Summary disposition of plaintiff's defamation claims against Guido and Hughes was proper as a matter of law. MCR 2.116(C)(10). In light of our decision, we need not address whether defendants' communications were protected by a qualified privilege.

IV

Plaintiff's second argument on appeal, that the trial court erred in summarily dismissing his false light invasion of privacy claims against Guido and Hughes, is without merit. An invasion of privacy claim actually encompasses four distinct torts:

- (1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs;
- (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness. [*Battaglieri v Machinac Ctr for Pub Policy*, 261 Mich App 296, 300; 680 NW2d 915 (2004).]

Here, plaintiff argues that defendants are liable under a false light theory because their actions implied that plaintiff was a dangerous individual.

The elements of an action for false light invasion of privacy are that the defendant broadcast to the public in general, or to a large number of people, information that would be highly objectionable to a reasonable person by attributing to the plaintiff characteristics, conduct, or beliefs that were false and placed the plaintiff in a false position. *Porter, supra* at 486-487. In addition, the defendant must have known of or acted in reckless disregard to the falsity of the publicized matter and the false light in which the plaintiff would be placed. *Detroit Free Press v Oakland Co Sheriff*, 164 Mich App 656, 666; 418 NW2d 124 (1987). This tort "is limited to situations where the plaintiff is given publicity." *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 385; 689 NW2d 145 (2004), citing *Sawabini v Desenberg*, 143 Mich App 373,

381; 372 NW2d 559 (1985). A claim for false light invasion of privacy cannot succeed if the contested statements are true. *Porter, supra* at 487. Indeed, a false light cause of action is similar to a defamation claim. *Battaglieri, supra* at 300.

Applying these principles to the instant case, plaintiff's false light claims fail on two independent, yet alternative grounds. First, as discussed *supra*, most of the communications cited by plaintiff were true, and the remaining communications constitute Guido's opinions, which are insufficient to support a cause of action for defamation or false light. Second, the communications were not made to the public in general or a large amount of people.

The record shows Guido's complaint was filed with Hughes, and internally investigated by an attorney. The police report was made with only the police department and plaintiff did not know it had been made until his union notified him of such. Although the memorandum Guido and Hughes sent to the DHS staff was sent to a group of people, the memo was clearly intended only for the staff as evidenced by the proviso at the top of the memorandum that states: "CONFIDENTIAL (THIS MEMO SHOULD NOT BE SHARED WITH ANYONE)." Plaintiff has not established any evidence sufficient to show that defendants made their communications to the public in general or to a large number of people. *Porter, supra* at 486-487. For the foregoing reasons, summary disposition was appropriate. MCR 2.116(C)(10).

V

Plaintiff's third argument, that the trial court erred by summarily dismissing his malicious prosecution case against Guido is without merit. To establish a claim for malicious prosecution, the burden is on the plaintiff to prove: (1) the defendant initiated a criminal proceeding against the plaintiff; (2) the criminal proceedings terminated in the plaintiff's favor; (3) the private person who instituted or maintained the prosecution lacked probable cause; and (4) the prosecution was undertaken with malice or a purpose in instituting the criminal claim other than bringing the offender to justice. *Matthews v Blue Cross & Blue Shield of Michigan*, 456 Mich 365, 378; 572 NW2d 603 (1998). As the Supreme Court explained in *Matthews, supra* at 377:

Malicious prosecution is a tort that "runs counter to obvious policies of the law in favor of encouraging proceedings against those who are apparently guilty, and letting finished litigation remain undisturbed and unchallenged." Prosser & Keeton, Torts (5th ed), § 119, p 876. However, the interests of persons wrongfully prosecuted must also be protected. Balancing the interests involved, actions for malicious prosecution have historically been limited by restrictions that make them difficult to maintain.

A

With respect to the first element, "when a private person gives to a prosecuting officer information that he believes to be true, and the officer in the exercise of his uncontrolled discretion initiates criminal proceedings based upon that information, the informer is not liable . . . even though the information proves to be false and his belief was one that a reasonable man would not entertain." *Matthews, supra* at 385 n 27, quoting 3 Restatement Torts, 2d, § 653, comment g, p 409. On the other hand, if a private person gives to a prosecuting officer

information that he *knows* to be false and the officer initiates criminal proceedings based upon that information, the informer may be held liable for malicious prosecution. *Id.* at 385 (emphasis added).

As discussed, *supra*, Guido did not provide false information to the Dearborn Police Department, but only stated his opinion that he felt threatened by plaintiff. Plaintiff, therefore, has failed to present evidence that Guido initiated a criminal proceeding against the plaintiff for purposes of a malicious prosecution claim.

B

With regard to the second element, "criminal proceedings are terminated in favor of the accused by (1) a discharge by a magistrate at a preliminary hearing, or (2) the refusal of a grand jury to indict, or (3) the formal abandonment of the proceedings by the public prosecutor, or (4) the quashing of an indictment or information, or (5) an acquittal, or (6) a final order in favor of the accused by a trial or appellate court." *Cox v Williams*, 233 Mich App 388, 391-392; 593 NW2d 173 (1999), citing 2 Restatement Torts, 2d § 658. Generally, a proceeding is terminated in favor of a party when the final disposition suggests the party is innocent. *Cox, supra* at 392. Here, charges were never brought against plaintiff. Plaintiff has cited neither facts nor law, which indicate that the lack of formal charges here is sufficient to show that the "criminal proceedings were terminated in his favor" because no criminal proceedings were ever initiated, a report was simply filed. *Id.* at 391-392.

C

With respect to the third element, probable cause is defined as reasonable grounds for suspicion, supported by circumstances sufficiently strong to cause an ordinarily cautious person to believe that the accused person committed the act. *Matthews, supra* at 387. Moreover, the core of the malicious prosecution tort is the false and malicious reporting of a crime. That is, "the plaintiff's burden in a malicious prosecution case is to make a prima facie showing that the defendant's agents lacked probable cause to believe that the plaintiff had committed a crime." *Matthews, supra* at 379.

The record shows that Guido had a contentious six-year dispute with plaintiff. As noted, Guido felt threatened by plaintiff and was not alone in his belief. Our de novo review leads us to conclude that, from Guido's perspective, he had probable cause to believe that plaintiff might attempt to harm him, which is exactly what he told police. More important is the fact that Guido did not report a crime, but simply met with police officers to notify them of plaintiff's suspension and concern for the safety at the school based on admittedly "veiled threats."

Because plaintiff has failed to proffer evidence sufficient to create a genuine issue of fact regarding the first three elements necessary to establish malicious prosecution, plaintiff's claim fails as a matter of law. MCR 2.116(C)(10). The trial court properly granted summary disposition of plaintiff's malicious prosecution claim against Guido.

VI

Plaintiff's fourth argument is that the trial court erred in summarily dismissing his abuse of process claim against Guido. We disagree. To recover for abuse of process, "a plaintiff must plead and prove (1) an ulterior purpose, and (2) an act in the use of process that is improper in the regular prosecution of the proceeding." *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992). Plaintiff must show that the ulterior purpose alleged is more than harassment, defamation or exposure to excessive litigation costs. *Early Detection Ctr, PC v New York Life Ins Co*, 157 Mich App 618, 629-630; 403 NW2d 830 (1986). There must be a corroborating act that shows defendants' improper ulterior purpose. It is not enough to have bad motive. *Bonner, supra*.

For purposes of this cause of action, "abuse of process" does not mean abuse of "process" in the sense of abuse of the summons used to begin the case, but rather the subsequent misuse of the proceedings "'for any purpose other than that which it was designed to accomplish.'" *Friedman v Dozor*, 412 Mich 1, 30; 312 NW2d 585 (1981), *Id.* at 30 n 18, quoting 3 Restatement Torts, 2d, comment a, p 474. Importantly, the action "lies for the improper use of the process after it had been issued, not for maliciously causing it to issue." *Id.* at 31.

Plaintiff argues that Guido's filing of the police report and prior statement that he intended to have plaintiff "removed" from DHS are sufficient evidence to create a genuine issue of fact concerning plaintiff's abuse of process claim. However, Guido's alleged "irregular act" (i.e., filing a police report) does not corroborate the alleged collateral purpose (i.e., having plaintiff "removed" from DHS). Although plaintiff believes defendants' ultimate purpose was to have him removed from DHS, Guido's bad motive alone is insufficient absent an overt act demonstrating the same. To defeat summary disposition, plaintiff was required to plead and prove that defendant used the process (i.e., the filing of a police report) as the basis to have plaintiff removed from school. Here, the evidence is the opposite – Guido filed the police report after he had already filed his complaint with Hughes, and there is no evidence that Guido subsequently used the police report to further his efforts against plaintiff. Summary disposition was appropriate as a matter of law. MCR 2.116 (C)(10).

Affirmed.

/s/ Janet T. Neff
/s/ Donald S. Owens
/s/ Karen M. Fort Hood